UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD, Applicant, v. MCDONALD'S USA, LLC, Respondent.	:	No. 1:16-mc-00321 (RJS) [rel. 15-mc-322]

NATIONAL LABOR RELATIONS BOARD'S REPLY IN SUPPORT OF ITS MOTION FOR AN ORDER TO COMPEL PRODUCTION OF DOCUMENTS, AND FOR OTHER CIVIL RELIEF

In this case, the National Labor Relations Board ("NLRB") asks this Court to find that Respondent McDonald's USA, LLC failed to meet its burden to adequately describe its privilege claims as to 22 entries asserted in its privilege logs, and to compel their production. While Respondent has produced a multitude of logs to date, the parties agree that Respondent's privilege claims must be evaluated in light of the privilege log Respondent produced February 15, 2016. (*See* Opp. at 18 (arguing that "McDonald's February 15th Privilege Log establishes privilege")). For the Court's convenience, all of the information concerning these 22 challenged entries is attached as Reply Exhibit 1.[1]

Despite Respondent's misguided efforts to inject the merits of the underlying administrative litigation into this proceeding, the issues presented in the NLRB's motion to

[1] The NLRB's Reply Exhibit 1, unlike Respondent's Opposition Exhibit 20, contains all the data fields from the February 2016 privilege log, including the nature of the document, date, title, author, and recipients.

compel are straightforward.[2] In considering the motion, the Court must decide two narrow issues: 1) whether Respondent's log adequately described its privilege claims, and 2) if not, what should be the consequence.

A. This Court Is Entitled to Consider the Special Master's Privilege Rulings, Which Were Within the Scope of His Authority.

Respondent argues that Special Master Jeffrey Wedekind's findings, analysis, and legal conclusions should effectively be ignored by this Court because "only district courts may evaluate claims of privilege." (Opp. at 10). Respondent is wrong. As one of Respondent's featured authorities attests, "Board adjudicators are authorized to make rulings on questions of privilege, as they have been doing for decades." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 498 (4th Cir. 2011) (citing examples of this practice dating back to 1962).

Although the Second Circuit has not squarely addressed the standard of review that applies when district courts examine NLRB privilege rulings, Respondent insists in its Opposition that this Court must conduct a *de novo* review. (Opp. at 11-12). But even if Respondent is correct, Black's Law Dictionary defines *de novo judicial review* to mean "[a] court's non-deferential review of an administrative decision, usu[ally] through a review of the administrative record." *Judicial Review, Black's Law Dictionary* (10th ed. 2014). Thus, nothing prevents this Court from considering the strength and persuasiveness of the analysis and legal

[2] Respondent's arguments concerning the merits of the underlying unfair labor practice case brought against it by the NLRB's General Counsel (Opp. at 2-5) have no bearing on this proceeding. *See e.g., NLRB v. C.C.C. Assocs., Inc.*, 306 F.2d 534, 538 (2d Cir. 1962) (explaining that "[n]o defense relating to the merits of the administrative proceedings may be raised" in a subpoena enforcement proceeding). Equally misguided is Respondent's claim that the NLRB is engaging in improper "pre-trial discovery." (Opp. at 1, 4). The subpoenas enforced by Judge McMahon were issued pursuant to Section 11 of the National Labor Relations Act, 29 U.S.C. § 161(1), and were returnable at the commencement of the hearing and not before. In any event, the Second Circuit has upheld the NLRB's broad authority to regulate pretrial discovery procedures. *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970).

conclusions articulated by the Special Master's Order. Given the Order's thorough explanation of the law and how Respondent's log measures up against the relevant legal standards, the NLRB contends that the Court may substantially benefit from careful review of the Special Master's Order, much like a court of appeals conducting *de novo* review benefits from considering the well-reasoned opinion of a district court.

B. As the Special Master Found, Respondent's Log Fails to Sufficiently Describe the Privilege Claims.

Respondent points to the number of words in its log descriptions as exemplary of its sufficiency. (Opp. at 17). But a log's sufficiency is judged by its specific content, not its verbosity. The 22 challenged log entries suffer from one or more overarching deficiencies: 1) they fail to meet the privilege elements for an entire class of withheld documents, namely attachments to emails; 2) they are too vague, as a result of ambiguous descriptions of documents "reflecting" the asserted privileges; and/or 3) they fail to adequately explain work product claims, specifically how the documents satisfy the elements of "at the direction of counsel" or "in anticipation of litigation."

1. Attachments to Emails are Not Adequately Described.

At least half of the challenged entries identify the withheld document as an email and/or email string "with attachment" or "and attachment": 104, 184, 287, 304, 305, 340, 578, 636, 637, 648, and 649. The entries provide no or nearly no description of the withheld attachment. Facts such as who authored the attachment, when it was created, whether the attachment and email have identical subject matter, and when the attachment became part of the email are indeterminate from the log.

Courts recognize that attachments to emails should be "treated separately for the purpose of assessing whether each item can be withheld on the grounds of privilege." *Abu Dhabi*

Commercial Bank v. Morgan Stanley & Co., No. 08 Civ. 7508(SAS), 2011 WL 3738979, at *4 (S.D.N.Y. Aug. 18, 2011) (special master report and recommendation), *adopted by* 2011 WL 3734236 (S.D.N.Y. Aug. 24, 2011); *see also In re Avandia Mktg., Sales Practices & Prods. Liab.*, MDL No. 1871, 2009 WL 4807253, at *4 (E.D. Pa. Oct. 2, 2009) (special master report and recommendation) ("While the e-mail in Document # 2 does arguably contain a request for legal advice (or approval) from an attorney, even if this e-mail were privileged, it would not make the attachments privileged."), *adopted after in camera review by* 2009 WL 4641707 (E.D. Pa. Dec. 7, 2009); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (magistrate opinion) ("Where a privileged document has attachments, each attachment must individually satisfy the criteria for falling within the privilege."). The log entries enumerated above do not sufficiently describe the authors, recipients, contents, or circumstances surrounding the creation of the attachments noted in those entries. And where, as here, there are insufficient facts to establish that the attachments – independent of the documents to which they were attached – are themselves privileged, waiver is an appropriate result. *See SEC v. Beacon Hill Asset Mgmt., LLC*, 231 F.R.D. 134, 145 (S.D.N.Y. 2004) (magistrate opinion).[3]

2. Descriptions of Documents as "Reflecting" Privileges are Susceptible to Differing Interpretations and are Not Adequate to Evaluate Privilege Claims.

Almost all of the challenged entries describe the withheld documents as "reflecting" attorney's mental impressions or confidential communications, and/or strategic action or information prepared at the direction of counsel: 104, 282, 304, 305, 336, 340, 364, 376, 578,

[3] Not all of the entries on Respondent's February 15 log suffer from these informational deficiencies. For example, privilege log Entries 133 and 134, both of which Special Master Wedekind found sufficient, specifically identified the attachment's author: "Email and attachment from McDonald's Counsel, S. Miller, Esq. (Business and Development Counsel - East Division) providing legal advice regarding equipment maintenance requirements." (Motion Ex. 3 at 83). In this light, the absence of similar information in the entries identified above is even more glaring.

603, 607, 612, 613, 636, 637, 648, 649, 656, 657, and 658. Respondent's word choice seems deliberate. "Reflecting" is vague compared with the terms used elsewhere in the log, "containing," "seeking," or "providing."[4] Despite the NLRB's requests for clarification (Motion Ex. 5), the word's meaning remains undefined by Respondent and susceptible to differing interpretations, including that the documents are not protected.

For example, for claims of attorney-client privilege, Respondent's log describes the emails and attachments as "reflecting" confidential communication. This may mean that each document is itself a confidential communication made for the purpose of obtaining or providing legal advice, which would result in each document being privileged. *See United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998). But an equally reasonable interpretation is that each document so designated is not itself the confidential communication, but instead a document that conveys facts or information that implements or obliquely alludes to previously given legal advice. In the latter example, the communication would not be protected. *See e.g., Agence Fr. Presse v. Morel*, No. 10 Civ. 2730, 2011 U.S. Dist. LEXIS 126025, at *12 (S.D.N.Y. Oct 28, 2011) (magistrate opinion) ("The privilege covers only the communication of advice, not the implementation of that advice.") (copy attached).

Likewise, for claims of work product privilege, Respondent's log describes emails and attachments as "reflecting" strategic action or information prepared at the direction of counsel. This description may be interpreted to mean that each document was created at the direction of counsel in anticipation of litigation, which would result in it being privileged. *See United States*

[4] Compare, for example, Entry 184 ("Emails and attachments containing attorney's mental impressions . . . ."), which the Special Master found adequate to establish Respondent's work-product privilege claims for two of three emails (Motion Ex. 1 at 22) with Entry 282 ("Email string . . . seeking and providing legal advice and reflecting attorneys' mental impressions . . . .") (Reply Ex. 1 at 3-4, 5-6).

v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996). Alternatively, the description could mean that the document alludes to facts or information contained in another document created at the direction in anticipation of litigation from which one can discern strategic action. In the latter scenario, the document would not be protected. *See e.g., Bowne of N.Y.C., Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993) (magistrate opinion) ("[T]he rule does not protect from disclosure the underlying facts known to the party or his counsel, even if acquired in anticipation of litigation.").

Similar language, describing documents as "relating to" or "regarding," has been found to be inadequate to sustain privilege claims in a privilege log. *See Favors v. Cuomo*, 285 F.R.D. 187, 223 (E.D.N.Y. 2012) (magistrate opinion) (finding that a log's description of a document as "relating to" or "regarding" an issue lacked the required specificity to evaluate whether a given privilege applies). As the proponent of the privilege, Respondent bears the ultimate burden of proof, and that burden cannot be discharged by mere conclusory assertions. *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Trust Co.*, No. 14-CV-04394 (AJN) (BCM), 2016 WL 2977175, at *4 (S.D.N.Y. May 20, 2016) (magistrate opinion); *Bowne*, 150 F.R.D. at 470.

3. Descriptions Fail to Adequately Satisfy the Elements of Work Product Claims.

Many of Respondent's claims for work product privilege depend on an assertion that the document contains "information . . . prepared at direction of counsel," "because of anticipated litigation," or some variation thereof: 104, 184, 282, 287, 304, 305, 336, 578, and 607. That description is insufficient to establish that the document was prepared "because of" anticipated litigation. Missing is a description of how – or even whether – the information was collected *for* counsel or *by* counsel.

For the documents to be protected by the work-product privilege, the party seeking to assert the privilege "must demonstrate that they were created 'by or for counsel in anticipation of litigation or for trial.'" *Procter & Gamble Co. v. Ultreo, Inc.*. 574 F. Supp. 2d 334, 336 (S.D.N.Y. 2008) (quoting *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 383 (2d Cir. 2003)). While it is true that a document "does not lose work-product protection merely because it is intended to assist in the making of a business decision," *Adlman*, 134 F.3d at 1195, "the 'because of' formulation . . . withholds protection from documents that . . . would have been created in essentially similar form irrespective of the litigation," *id.* at 1202.

Here, the log merely recites the privilege elements. This is not enough to sustain Respondent's privilege claims. The standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. Once again, Respondent's log falls far short of meeting its burden.

C. Respondent's Obstinacy Justifies a Finding of Waiver by this Court.

The Special Master found that Respondent waived privilege by failing to timely submit an adequately detailed log or otherwise provide information sufficient to intelligently evaluate its privilege claims. (Motion Ex. 1 at 54). Because Respondent has failed to disclose the 22 items even after the Special Master's Order, the NLRB asks this Court to impose this remedy. And, this Court has ordered waiver where a party untimely fails to include sufficiently descriptive information in a privilege log. *See Favors*, 285 F.R.D. at 222; *Constr. Prods. Research, Inc.*, 73 F.3d at 473; *Bowne*, 150 F.R.D. at 474-75.

Waiver is especially appropriate here because Respondent has long been on notice of its log's deficiencies. Immediately after receipt of the February 15, 2016 log, representatives of the NLRB's General Counsel notified Respondent that more information was needed to assess the privilege claims, including the 22 challenged entries. (*see* Motion Ex. 5, NLRB's February 24 letter). In response, Respondent provided clarification for other documents that it purported to be "above any serious dispute as to privilege." (Motion Ex. 7 at 1). No clarification was given for the 22 challenged entries.

When the parties were unable to informally settle the dispute, the General Counsel sought resolution at the administrative level. An administrative law judge was appointed to act as a Special Master to decide, in part, the same two issues before this Court: whether Respondent's log adequately described its privilege claims, and if not, what should be the consequence. Respondent argued to the Special Master, just as it does to this Court, that "there is nothing wrong with [Respondent's February 15, 2016] privilege log or its remaining claims of privilege." (Motion Ex. 11, at 2). The Special Master disagreed. He found the majority of log entries, including the 22 challenged entries, "too vague or conclusory" to evaluate Respondent's privilege claims and ruled that Respondent waived privilege with respect to these claims. (Motion Ex. 1). Respondent clearly wishes to tie its fate to the sufficiency of the February 2016 log. In these circumstances, it would make little sense to give Respondent yet another chance to fix what Respondent believes is not broken.

In addition, this Court considers prejudice as a factor relevant to assess whether to impose waiver. *In re Chevron*, 749 F. Supp. 2d 170, 183 (S.D.N.Y. 2010). Respondent contends that the NLRB has not articulated how it has been prejudiced by not having received the challenged documents. (Opp. at 18). To this point, the NLRB does not know the full extent of

the prejudice, because Respondent has full control over the documents and their descriptions. But, by Respondent's continued withholding of this information, the NLRB has already suffered at least two forms of prejudice: 1) the NLRB's General Counsel has been deprived of the timely use and testimony of those documents during the ongoing administrative hearing, and 2) the NLRB has expended needless time and resources to litigate this dispute. *See e.g.*, *NLRB v. Sanders-Clark & Co.*, No. 2:16-CV-02110-CAS, 2016 WL 2968014, at *7 (C.D. Cal. Apr. 25, 2016) (explaining that a McDonald's franchisee's "delay in timely producing a privilege log," in the same administrative proceeding involving Respondent here, prejudiced the NLRB in its ability to go to trial and fully examine witnesses).

D. Conclusion

For the foregoing reasons and for those previously given in its motion papers, the NLRB's motion to compel should be granted.

Dated at Washington, D.C.
October 6, 2016

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Reply using the Court's CM/ECF filing system and by electronic mail, thereby providing service to all counsel of record.

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Dated at Washington, D.C.
October 6, 2016